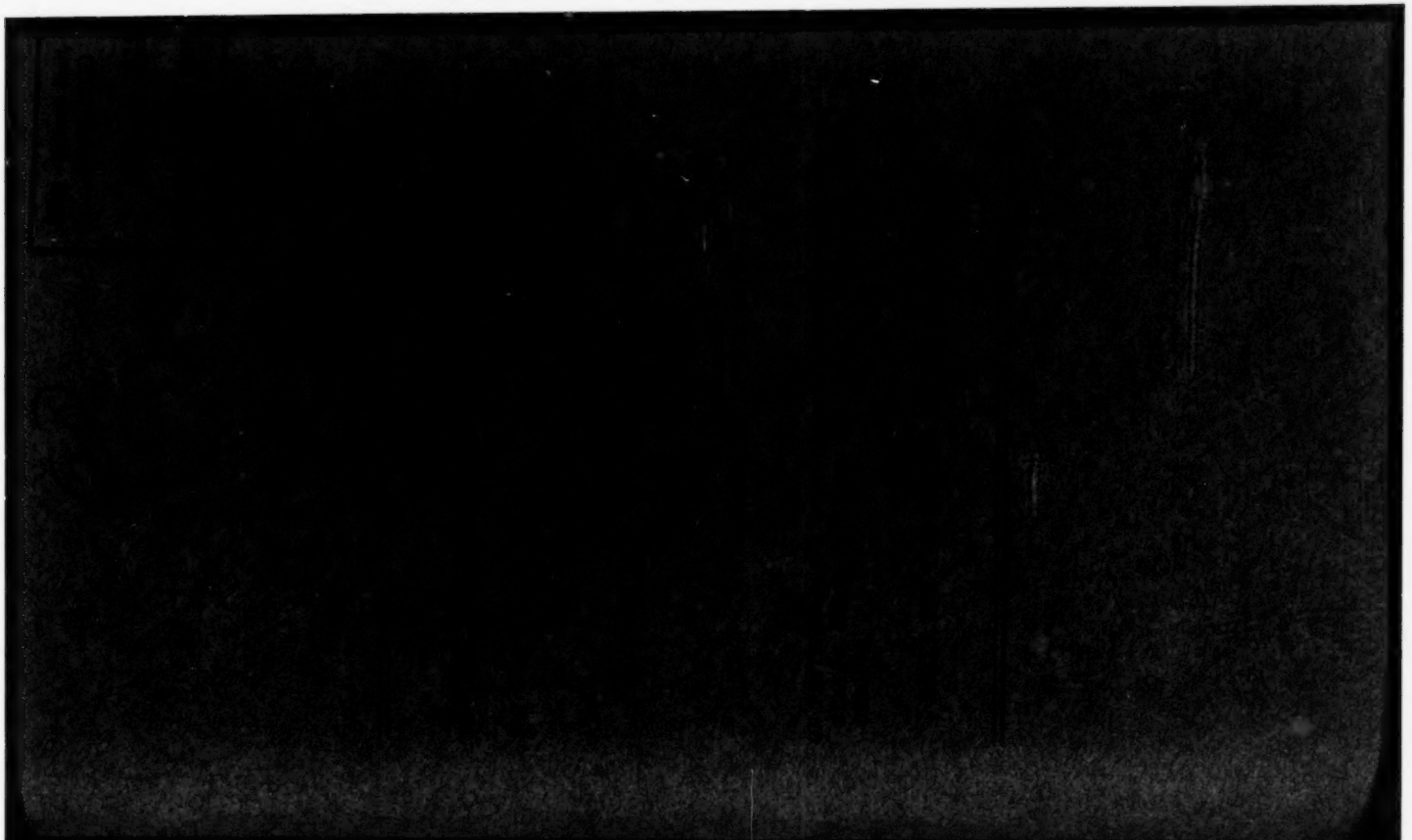

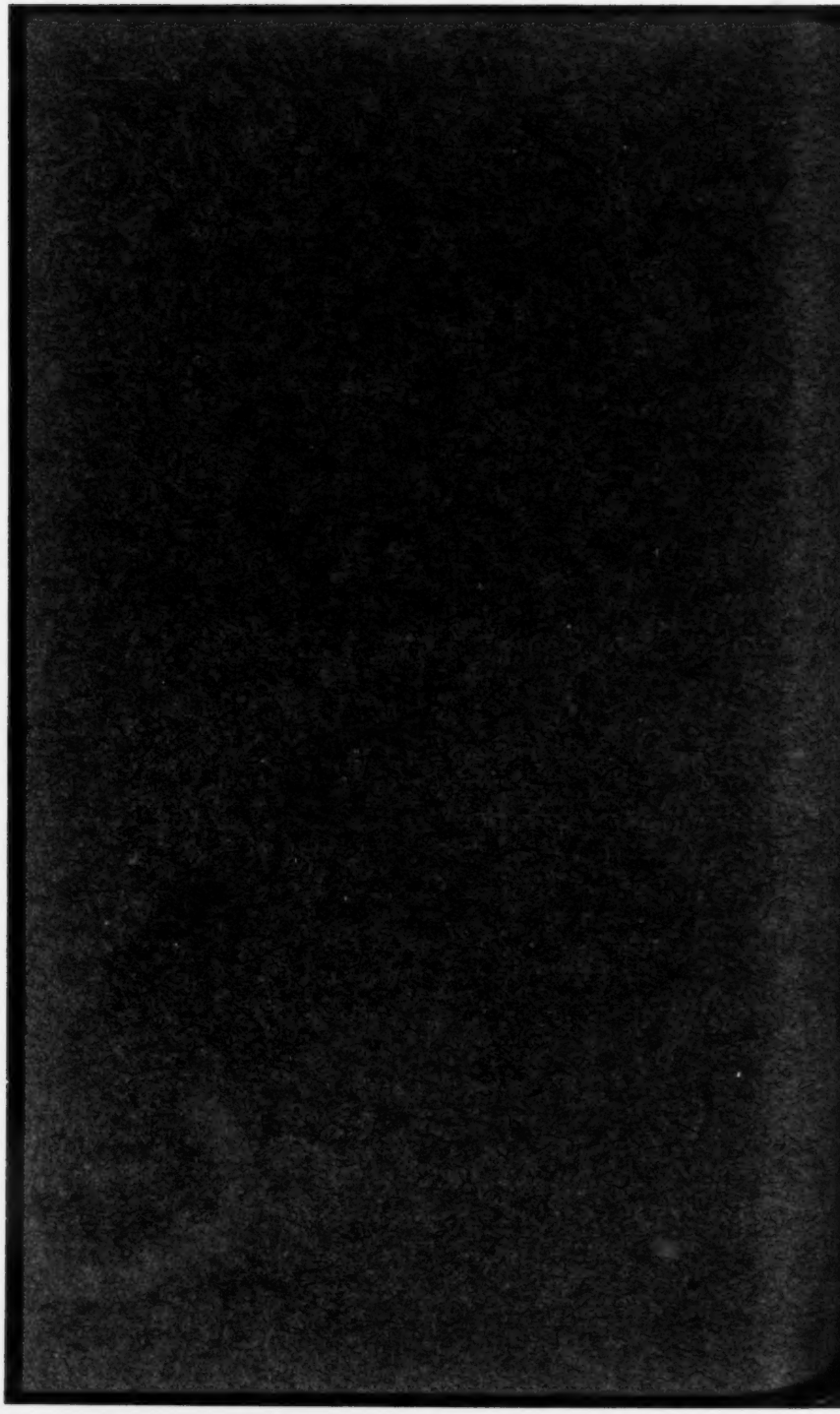

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 723

EMANUEL MAX COHEN AND ALBERT CHARLES SCHNEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 386–399) is reported at 144 F. (2d) 984.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 29, 1944 (R. 399–400). A petition for rehearing was denied November 6, 1944 (R. 400). The petition for a writ of certiorari was filed December 2, 1944. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal contentions raised by the petition for a writ of certiorari are:

1. Whether in the circumstances presented by the case certain actions of petitioner Cohen, a Government Appeal Agent in the Selective Service System, and of the local draft board to which he was attached were within their official capacity within the meaning of Section 117 of the Criminal Code (18 U. S. C. 207).

2. Whether the trial court erroneously received in evidence certain statements made by petitioner Schnee, on the theory that they were statements by a coconspirator regarding the conspiracy made during the existence of the conspiracy.

3. Whether the admission in evidence of certain oral statements made by petitioner Schnee under circumstances claimed to render applicable the rule of *McNabb* v. *United States,* constituted reversible error.

STATUTES AND REGULATIONS INVOLVED

The applicable statutory provisions and Selective Service Regulations, as worded at the times in question, are set forth in the Appendix, *infra,* pp. 24–29.

STATEMENT

On March 31, 1943, petitioners were indicted in the District Court of the United States for the Southern District of California in two counts (R. 2–7). Count one (R. 2–5) charged that on March 6, 1943, there was pending before Local Board No. 199, Los Angeles, California, an application by one James L. Sartor, a Selective Servive registrant who had already been inducted into the Army, for a recommendation by the board to the Army that his furlough be extended; that petitioner Cohen was the Government Appeal Agent attached to the local board; and that petitioners on or about March 6, 1943, unlawfully conspired with intention to defraud the United States "by endeavoring to corruptly obstruct, impede, hinder, impair and interfere with the due administration of the proper and lawful function of the United States Army in the granting or denying of an extended furlough to" Sartor, in that for a sum of money petitioner Cohen, as Government Appeal Agent, would endeavor to corruptly obtain from the local board a favorable recommendation with respect to Sartor's furlough application, in violation of Section 37 of the Criminal Code (18 U. S. C. 88). Count two (R. 5–7), incorporating by reference the facts alleged in count one, charged that petitioners unlawfully conspired to violate Section 117 of the Criminal Code (18 U. S. C. 207) by asking for money from Sartor for the

purpose of influencing the action of petitioner Cohen in the performance of his official duty as a Government Appeal Agent in respect of Sartor's application for a recommendation relating to his request for a furlough extension. Petitioners were convicted on both counts (R. 20–21), but judgment was entered only on the second count. Petitioners were each fined $2,500 and sentenced to imprisonment for nine months (R. 28–32). On appeal, after rehearing, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (R. 399–400).[1]

The evidence in support of the judgment may be summarized as follows:

Sartor, a Selective Service registrant with Local Board No. 199, Los Angeles, California, was inducted into the United States Army on October 14, 1942. At the time of his induction he was given a short furlough and thereafter was granted various extensions until March 8, 1943, when he was to report for active duty (R. 67–68). The purpose of the furloughs was to enable him to dispose of his holdings, a retail liquor store, a bar,

[1] On May 19, 1944, the Circuit Court of Appeals, Judge Healy dissenting, reversed the conviction on the ground that petitioner Cohen's official duties as Government Appeal Agent did not include authority to recommend an extension of furlough for a registrant already inducted into the Army (Pet. 41–50). On June 17, 1944, the court granted the Government's petition for rehearing (R. 384–385). On September 29, 1944, it affirmed the judgment of the District Court (R. 385).

and an equity in an apartment house, without financial loss. On February 11, 1943, Sartor requested an additional 60 days' deferment from active duty by letter addressed to Major General Joyce of the Ninth Service Command, Fort Douglas, Utah (R. 68–69), and was advised by letter from Lt. Col. A. E. Merrill of that Command that a recommendation from his local Selective Service Board would be necessary to secure a further extension (R. 70, 71). At the direction of his local board (R. 71), Sartor went to the place of business of petitioner Cohen, the Government Appeal Agent, on Monday, March 1, 1943, and showed him Lt. Col. Merrill's letter suggesting that he obtain the draft board's recommendation with regard to his application for a further furlough (R. 72). Cohen instructed Sartor to appear at the draft board headquarters that evening. When Sartor appeared at the board's office he was interviewed by Cohen, who dictated a letter as Government Appeal Agent to the Army authorities describing Sartor's property holdings and financial position and stating that Sartor requested an extension of his furlough on the basis of those facts. The letter was posted by Sartor on the following day (R. 71–74) and on the same day Sartor again called on Cohen and told him that the letter was not "any good" because it did not contain a recommendation. Cohen then advised Sartor that he had no authority to make a recommendation. On

the following day Sartor again went to see Cohen, requesting a recommendation, and Cohen again advised him that he had no power to make a recommendation. (R. 75.)

Sartor did not see Cohen again until the following Saturday morning, March 6, 1943, when at about 11:00 a. m. Cohen stopped at Sartor's place of business in his automobile, blew his horn, and when Sartor came out stated to him that he had someone by the name of "Davis" who was going to help him get an extension from the Army and that "Davis" would telephone him in about 10 or 15 minutes about getting the extension (R. 75, 76). Shortly thereafter Sartor received a telephone call from "Davis", who told Sartor that a 60-day extension would cost $2,000 (R. 76, 78–79). Sartor told him he thought the price was too high, but that he should call him again (R. 79). About one hour later Cohen again appeared in his car outside of Sartor's place of business, blew his horn, and when Sartor came out drove him around the block in Cohen's car. When Sartor entered the car Cohen asked, "Did he call you up?" Sartor related his conversation with "Davis" and Cohen stated that he had nothing to do with the transaction. Cohen then described "Davis" to Sartor and said that "Davis" would "come down and see" Sartor (R. 79–80). Cohen did not advise Sartor that the draft board had just decided to recommend a 30-day extension of Sartor's fur-

lough and that a wire to this effect already had been sent to the Army authorities (R. 81).

"Davis" again telephoned Sartor at about one o'clock on the same day and promised to see what he could do for him for $500 (R. 81). "Davis" called Sartor a third time an hour later and informed Sartor he could get him a 30-day furlough for $500. He instructed Sartor to put the money in an envelope and to deliver it to a Mr. Popkin, the manager of a nearby theater, at about 2:30 o'clock that day. Because Sartor did not have enough money on hand, "Davis" agreed to a partial payment. (R. 82, 83, 106–107.) Sartor complied with "Davis' " instructions, but before doing so apprised one Donovan, a detective from the Los Angeles Police Department, of the developments (R. 83–85). As soon as Sartor delivered the envelope containing the money, Donovan presented himself to Popkin and requested delivery of the envelope. About one hour later, after he had called his attorney and talked on the telephone with an official of the Los Angeles Police Department, Popkin surrendered to Donovan the envelope given him by Sartor (R. 147–149). Donovan opened it and found in it the money placed there by Sartor. (R. 114–115.)

Popkin testified that petitioner Schnee with whom he was friendly had called him early in the afternoon of March 6, 1943, and asked him to accept delivery of an envelope for him. Schnee

told Popkin that the envelope would be addressed to a "Mr. Davis" and would be delivered at approximately 3 o'clock and that "the man delivering the envelope knew him [Schnee] as Mr. Davis." (R. 144–145.) Popkin received the envelope from Sartor at the request of Schnee and testified that after he had surrendered it to Donovan, he told Donovan he would call the man known as "Mr. Davis." He called Schnee's home and left a message with his wife. In response to that message Schnee thereafter called Popkin and they conversed concerning the envelope while Donovan listened on another telephone. (R. 115–117, 148–149.) Immediately thereafter Schnee was interviewed by Donovan and others (see *infra*, p. 16). He denied having any part in the bribery scheme, but admitted that he knew petitioner Cohen (R. 150). At this point he was placed under arrest (R. 123).

Testifying in his own defense petitioner Cohen stated that he had been appointed Government Appeal Agent in September 1940 and had acted in that capacity through the period in question here (R. 202); that "it is my job to present matters for registrants" (R. 228); that Sartor's local board referred the matter of Sartor's recommendation to him and that it was his function to present Sartor's application to the draft board (R. 214, 224); that when the Sartor matter was first presented to him, he requested the clerk of the draft board to communicate with the Coor-

dinator of Selective Service to determine "whether the Board had jurisdiction to entertain such a recommendation" (R. 209), and that he was thereafter informed that the Coordinator had advised that the board possessed jurisdiction to make a recommendation in Sartor's case (R. 209); that when Sartor consulted him on March 4, 1943, "I told him that the Board had jurisdiction; that I will present it to them * * * at a meeting on Saturday morning" (R. 209); that he suggested to the board that it meet on Saturday morning, which was not its regular meeting time (R. 226); and that on Saturday "I went down for the sole purpose of presenting Sartor's name, he was so insistent, and talked so persistently I brought the matter up" (R. 227).

While these events were taking place, the Army authorities received the letter written by petitioner Cohen as Government Appeal Agent (*supra*, p. 5) and, regarding it as a favorable recommendation from the local board, granted Sartor another sixty-day furlough (R. 178). When it was discovered that Cohen's letter was not the recommendation of the board and that the board had thereafter recommended only a thirty-day furlough, the sixty-day furlough which had been granted was immediately canceled by the military authorities (R. 179–180).

ARGUMENT

1. Petitioners' basic contention (Pet. 21, 31) appears to be that the alleged conspiracy did not

relate to any of Cohen's official duties and hence could not be a conspiracy to violate Section 117 of the Criminal Code. Petitioners argue that when Sartor was inducted into the armed forces his local board's jurisdiction over him and Cohen's official duty as Government Appeal Agent in respect of him ended. We submit that, in the light of the relationship which exists between the Selective Service System and the armed forces, (a) Cohen's and the local board's actions, which the solicited bribe was to influence, were within their authority, and (b) petitioners conspired to commit an offense under Section 117 of the Criminal Code even if, strictly speaking, the functions performed by the Selective Service System in relation to post-induction furloughs are beyond its authority.

In the words of this Court in *Billings* v. *Truesdell*, 321 U. S. 542, 547, "the mobilization program established by the Selective Service System is designed to operate 'as one continuous process for the selection of men for national service'—a process in which the civil and military agencies perform integrated functions." This Court there was concerned with those phases of the process of selection which precede induction; but we think its characterization of the relationship of the Selective Service System to the armed forces is equally applicable to the functions of the System after a registrant has been inducted.

Section 10 (a) (2) of the Selective Training and Service Act (*infra*, p. 25) empowers local boards

to hear and determine "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service" under the Act "of all individuals within the jurisdiction" of the boards. Under Selective Service Regulation 603.54 (*infra*, p. 26) the jurisdiction of each local board extends to all persons registered in or subject to registration in the area for which it was appointed. The local board's functions do not end with its selection of registrants for military service in the manner summarized in *Falbo* v. *United States*, 320 U. S. 549. It does not strike a registrant from its rolls upon his induction but is required to reclassify him I–C (member of land or naval forces); he remains registered with it. Selective Service Regulation 622.15 (*infra*, p. 28). The armed services may invoke the assistance of local boards in dealing with matters lying within their competence after induction, as the Army did in this case in suggesting that Sartor obtain the recommendation of his board with reference to the extension of his furlough. As Colonel Merrill testified (R. 177), "if we did otherwise * * * the effect would be to nullify the procedure of the Selective Service system in ordering a man in."[2]

[2] In respect of the reliance of the military authorities on the recommendation of the registrant's local board Colonel Merrill's letter to Sartor (R. 70) explained the procedural requirement as follows:

> It is suggested that you present a copy of this communication to your Local Board, and ask them to make their

Pursuant to the Act and regulations, official memoranda of the Selective Service System, cited in the opinion of the court below (R. 391–392), have continuously recognized and provided for functions of local boards with respect to registrants who have been inducted into the armed forces. Local Board Memorandum No. 80, issued on January 10, 1942 (*infra*, pp. 29–33), imposes upon local boards the duty to cooperate with the military authorities in connection with the separation of inducted men from active military service and their transfer to the Enlisted Reserve for proper reason. Memoranda Nos. 1–415 and 1–423 to State Directors, dated April 17 and May 18, 1942 (*infra*, pp. 33–36) and State Director Advice No. 204, dated May 8, 1943 (*infra*, pp. 36–37) impose similar duties with respect to post-induction furloughs and post-induction stays of active service for newly drafted men.[3]

Paragraph 603.71 of the Selective Service Regulations (*infra*, p. 27) provides for the Govern-

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recommendation through the State Director of Selective Service, Plaza Building, Sacramento, California. It is the function of the Selective Service System to register, classify, and deliver for induction men who are considered eligible and qualified for such procedure. It is not consistent that the War Department should nullify the action of the Selective Service System by unduly extending the deferment status of individuals selected for service. Hence the procedure suggested above.

[3] As this Court noted in *Billings* v. *Truesdell*, 321 U. S. 542, 554, the induction procedure has again been changed to eliminate post-induction furloughs and stays in ordinary cases.

ment Appeal Agent to undertake investigations "after classification" of registrants, with respect to matters submitted by the local board, and "to impart to the local board * * * information which in his opinion ought to be investigated." Petitioner Cohen caused an inquiry to be made of the Coordinator of the Selective Service System concerning the power of the local board to make a recommendation in Sartor's case (*supra,* pp. 8–9) and was advised that it was vested with authority to do so. The board acted upon his suggestion. In causing the board to meet and consider Sartor's request that an additional furlough be recommended, he was legally as well as *de facto* (in the words of Section 117 of the Criminal Code, *infra,* p. 24) "acting for or in behalf of the United States, in any official capacity, under or by virtue of the authority of * * * [a] department or office of the Government * * *."[4] He acted

[4] We perceive no merit in petitioners' assertion (Pet. 31) that since the Army mistakenly granted Sartor a furlough prior to March 6, 1943, the day the draft board met (see *supra*, p. 9) there was no valid basis for count two of the indictment, as the matter for which the official action was to be sought had already been accomplished. Regardless of whether the local board's recommendation would have had any operative effect, there is no question that the board might make a recommendation to the Army or that petitioner Cohen in his official capacity as Government Appeal Agent participated in the presentation of the matter to the local board. In these circumstances a conspiracy to obtain a bribe to influence Cohen's official action was a conspiracy to violate Section 117 of the Criminal Code.

officially when he interviewed Sartor at the board's office and evidently had reference to further official action in his subsequent dealings.

The court below properly took judicial notice of "the general system which * * * has now been in force and operation throughout the country for several years" (*Crimmian* v. *United States*, 1 F. (2d) 643, 644 (C. C. A. 6)), in determining the official nature of the actions to which the bribe was to relate. In order to constitute official action within the purview of Section 117 of the Criminal Code (18 U. S. C. 207), it is not required that the action be prescribed by statute, but sufficient that it come within the authority and practice of the agency which the officer is serving. *United States* v. *Birdsall*, 233 U. S. 223; *Haas* v. *Henkel*, 216 U. S. 462; *Benson* v. *Henkel*, 198 U. S. 11; *Daniels* v. *United States*, 17 F. (2d) 339 (C. C. A. 9); *Cohen* v. *United States*, 294 Fed. 488 (C. C. A. 6), certiorari denied, 264 U. S. 584. In the *Birdsell* case this Court stated that it is not "necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. * * * In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the

provisions of the above-mentioned statutes against bribery." 233 U. S. at p. 231.

Even if it were thought that functions relating to Sartor's furlough were beyond the legal authority of the local board and of Cohen, the offense of bribery under Section 117 of the Criminal Code and conspiracy to bribe might be committed with respect to them. It is sufficient if the official in question "acted under color of authority," at least if he "was a de jure officer occupying at the time a lawful office * * *, * * * acting in a de facto capacity." *Fall* v. *United States,* 60 App. D. C. 124, 49 F. (2d) 506, 509, certiorari denied, 283 U. S. 867. Such is the prevailing doctrine with respect to the crime of bribery. Miller, *Handbook of Criminal Law,* p. 474. It cannot be doubted that Cohen's acts were "under color of authority" in this sense. At the very least, he acted "corruptly in a matter to which he * * * [bore] some official relation". *People* v. *Lafaro,* 250 N. Y. 336, 342 (1929).

2. Primarily on the theory that the conspiracy had already ended, petitioners contend (Pet. 33–36) that the trial court committed reversible error in receiving in evidence testimony relating to oral statements made by petitioner Schnee when he was first questioned at his place of employment, prior to his removal to police headquarters. Since it is clear that the object of the conspiracy had not been accomplished at the time the statements were

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made and that the bribery scheme was still operative except as it had been frustrated without the knowledge of the parties, we submit that petitioners' contention is without merit.

The contention has reference to Schnee's conversation with Donovan, Popkin, and one Barr immediately after the incident at Popkin's theater when Sartor's envelope was recovered (*supra*, p. 7). Donovan, Popkin, Barr, and Popkin's wife called on Schnee at his place of employment at about 4:30 p. m. on March 6, 1943, about two hours after Sartor had delivered part of the bribe to Popkin (R. 130). In the course of their conversations with Schnee he denied that he had had any part in the bribery scheme or that he had initially called Popkin earlier in the day. He admitted that he knew Cohen and that he had seen him on the morning of that day, but he claimed that he saw him with respect to an income tax matter. (R. 117–123; 130–133; 150–151.) At this point, Donovan advised Schnee "that I was going to take him up town to the police station" (R. 123).

We think it is clear that Schnee's statements were those of a conspirator seeking to conceal the conspiracy and, as such, were admissible against both petitioners. *United States* v. *Goldstein*, 135 F. (2d) 359 (C. C. A. 2); *United States* v. *Woods*, 66 F. (2d) 262 (C. C. A. 2); *Fisher* v. *United States*, 8 F. (2d) 978 (C. C. A. 1), certiorari denied, 271 U. S. 666. Contrary to petitioners' contention at the trial (R. 121), the delivery of

the money by Sartor to Popkin did not accomplish the object of the conspiracy, which was the receipt of $500 by Cohen and Schnee. At the time of Schnee's statements none of the money had been received by petitioners. Sartor had delivered $155 to Popkin (R. 84; see *supra,* p. 7), but even that money was recovered before it reached petitioners. When he was interviewed, petitioner Schnee plainly did not regard the conspiracy as being at an end. In these circumstances, aside from the fact, pointed out by the Circuit Court of Appeals (R. 399), that Schnee's statements were not prejudicial evidence since he testified to the same effect at the trial, we submit that the trial court properly concluded that the statements were made prior to the termination of the conspiracy and were therefore admissible against both petitioners.

3. Finally, petitioners contend (Pet. 37–38) that the trial court committed reversible error in receiving in evidence the testimony of F. B. I. agent MacCulloch as to statements made by Schnee while in custody, but prior to arraignment. Particularly, petitioners complain of MacCulloch's testimony that Schnee refused to sign a statement unless advised to do so by his attorney. Consideration of the circumstances surrounding Schnee's examination prior to arraignment and of the fact that his statements were of an exculpatory nature compels the conclusion, in our view, that "the foundation for appli-

cation of the *McNabb* doctrine are here totally lacking." (*United States* v. *Mitchell*, 322 U. S. 65, 69.) For it is clear that Schnee's oral statements were not secured during a period of illegal detention and that petitioners' convictions do not rest, in any sense, on the statements.

As we have shown, *supra*, pp. 8, 16, after Schnee was interviewed at his place of employment, he was advised by detective Donovan that he would have to accompany him to the Los Angeles police station. At Schnee's request they first proceeded to his home, where he left his automobile, and where he saw his wife (R. 123). He told her that he was going to police headquarters for questioning (R. 252–253). At this point, shortly after 5:00 p. m. on Saturday, March 6, 1943, Donovan called the Federal Bureau of Investigation into the case since it involved a violation of federal law (R. 124, 127, 133, 151). Schnee testified that the agents arrived at police headquarters shortly after 7:00 p. m. (R. 255). There is nothing in the record showing any interrogation of Schnee by the agents until almost 10:00 p. m., at which time they requested him to accompany them to the F. B. I. office "so that we could get the story in this case" (R. 277). Schnee replied, "I will be very glad to go along and tell you what I know" (R. 277, 260). Schnee and the F. B. I. agents, accompanied by Popkin, Sartor, Donovan, and three other persons who apparently were witnesses, proceeded to the F. B. I. office, arriving

there at approximately 10:00 p. m. (R. 151, 257, 281).

Schnee testified that at a time not precisely stated he requested and received permission from the F. B. I. agents to telephone his wife. He did not seek to call an attorney (R. 256, 268). The agents then proceeded to examine each of the persons present, none of whom had as yet been arrested (R. 161, 260, 278), concerning the case (R. 279). In respect of the interrogation of Schnee, Agent Wells testified (R. 278–279), "I advised Mr. Schnee that we were interested in getting his story in this case; wanted to hear what he had to say about it. I advised him at that time that he did not have to make any statement; I advised him that he did not have to say a word unless he had talked to his attorney, or unless he wanted to. I advised him at that time that anything he did say would be used against him in court. He said, 'I will be glad to tell you fellows anything you want me to.'" Schnee denied any knowledge of illegal acts (R. 162). He admitted that he had called Popkin at 4:00 p. m. in response to his telephone message (*supra*, p. 8) and that he knew Cohen and had seen him that morning with regard to an income tax problem; but he denied knowing Sartor (R. 163–164, 257). Schnee declined to sign a statement unless he was advised to do so by his attorney (R. 164; see also R. 258).

During the interrogation of Schnee it was established that in violation of Selective Service Regulation 617.1 (*infra*, pp. 27–28), he did not have in his possession a selective service registration card (R. 279). Either at 1:00 a. m. or at 3:00 a. m. in the morning (on Sunday, March 7, 1943) (R. 164, 258), he was arrested on a charge of not possessing such a card and was placed in jail. He was not questioned further. At 8:00 a. m. on Sunday the United States Attorney authorized the issuance of a complaint charging Schnee with failure to have his draft registration card in his possession (R. 279–280). At an unspecified time during the day he was arraigned before a United States Commissioner and at 7:00 p. m. he was released from custody on bond (R. 274, 259). On Monday, July 8, 1943, the United States Attorney authorized the issuance of a complaint on the present charges and Schnee was rearrested at that time (R. 259, 280), but there is no evidence that he was questioned further. Schnee testified that during the period of interrogation of from three to five hours he was questioned only intermittently and that he slept a part of the time (R. 258).

The only sharply disputed evidence in respect of petitioner Schnee's detention concerns the efforts of an attorney to reach him at the F. B. I. office Saturday evening. Ross, an attorney, testified that he was asked to inquire into Schnee's detention; that the Los Angeles police referred

him to the Federal Bureau of Investigation; that he was unable to gain entrance into the building containing the F. B. I. office; and that he telephoned the F. B. I. office but was advised that they had no knowledge of Schnee (R. 271–273). F. B. I. agent Wells,[5] on the other hand, testified that all persons were free to come to the F. B. I. offices at night; that "there is a night bell there, and the elevator operator, who works for the building, will bring them up, and they push that bell or knock at the door that adjoins the bell. There is an agent in the reception room, and a clerk is there also, right at the switchboard;" that he received no telephone call from Ross on the night in question; and that while he was at the Los Angeles police station, no one inquired of him concerning Schnee's whereabouts (R. 278, 281; see also, R. 165–166).

Upon its facts this case is unlike the *McNabb* case and more closely resembles *United States* v. *Mitchell*, 322 U. S. 65. As in the *Mitchell* case, Schnee was anxious immediately to state to the F. B. I. agents his version of the pertinent events, undoubtedly in the hope that he might clear himself. He testified that "I told the F. B. I. that I would make a complete statement and tell them all I knew about it" (R. 260). Moreover, as in

[5] Schnee testified (R. 268) that while he was at the F. B. I. office agent Wells talked on the telephone with Ross and that Ross was informed that Schnee was not there.

that case, the statements admitted in evidence were not obtained by reason of coercion of any kind unless the time of questioning itself, from three to five hours, is deemed coercive. Schnee was arraigned promptly on Sunday before a United States Commissioner and released on bond. Even if there had been unreasonable delay in arraignment, that fact would not operate retroactively to render inadmissible the evidence which had been properly obtained. *United States* v. *Mitchell, supra.*

The statements which the agent, MacCulloch, testified Schnee made, moreover, were not essentially different from the statements which he made when he was first interviewed at his place of employment; and these had already been received in evidence at the time MacCulloch testified (R. 150–151, 163–164). Therefore the error, if any, in admitting MacCulloch's testimony regarding these statements was not prejudicial.

Petitioners' complaint rests also upon the admission in evidence of testimony regarding Schnee's refusal to sign a written statement. Petitioners' view (Pet. 37–38) appears to be that a refusal to sign a statement is akin to the omission of a criminal defendant to testify and should therefore not be referred to at the trial. This argument, however, does not aid the petitioners, since both of them testified in their defense and therefore overcome any possible adverse inference from the refusal to sign a statement. They were

not prejudiced by evidence of conduct on Schnee's part which was not harmful to their cause in the light of subsequent events.

CONCLUSION

For the reasons stated, we respectfully submit that the affirmance of the judgment of conviction by the court below was free of error. The case presents no conflict or important issue of law, and the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
IRVING S. SHAPIRO,
MAYTE B. GREENE,
Attorneys.

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